Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*,
JAMES M. CHURCHILL,

Petitioner,

v.

THE STATE OF TEXAS, TEXAS DEPARTMENT OF HUMAN SERVICES, TEXAS DEPARTMENT OF HEALTH, AND TEXAS HEALTH AND HUMAN SERVICES COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this case is also presented in No. 98-1828, *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, currently set to be argued before this Court on November 29, 1999, and is as follows:

> Whether the Eleventh Amendment to the United States Constitution bars *qui tam* suits against a State under the False Claims Act, 31 U.S.C. §§ 3729-3733, if the United States, though not a formal party by intervention, remains the real party in interest and retains the power to control the prosecution and resolution of the litigation.

PARTIES TO THE PROCEEDING

The parties in the United States Court of Appeals for the Fifth Circuit were the United States of America (which intervened in the appeal), *qui tam* plaintiff James M. Churchill, and defendants the State of Texas, the Texas Department of Human Services, the Texas Department of Health, and the Texas Health and Human Services Commission.

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The United States *ex rel.* James M. Churchill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

Neither the opinion of the court of appeals (Appendix, *infra*, at App. 1a - App. 2a) nor the opinion of the district court (App. 3a - App. 43a) is reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 5, 1999. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The relevant portions of the False Claims Act, 31 U.S.C. §§ 3729-3733, are reproduced at App. 44a - App. 61a.

STATEMENT OF THE CASE

1. Originally enacted in 1863, the False Claims Act ("FCA"), now codified at 31 U.S.C. §§ 3729-3733, is the federal Government's "primary litigative tool for combating fraud" committed by all "unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5273. Under the Act, any person who knowingly presents or causes to be presented a false or fraudulent claim to the United States for payment or approval is liable to the Government for three times the amount of damages the Government sustains because of that person's act plus penalties for each false claim submitted.

In 1986, Congress substantially amended the FCA and, in particular, its *qui tam* provisions. Section 3730(b) allows any person to bring an FCA suit in the name of the Government to recover damages suffered by the United States and to share in any recovery obtained as a result of the suit. The *qui tam* plaintiff, known as a relator, files a complaint under seal in a United States District Court. Simultaneously, the relator must serve a copy of the complaint on the federal Government together with a written disclosure describing all information and evidence in the relator's possession concerning the case. 31 U.S.C. § 3730(b)(2).

The United States then has at least 60 days to investigate the relator's allegations and determine whether to intervene and proceed with the action. *Id.*, § 3730(b)(3). If the United States intervenes, the action is formally conducted by the Government. *Id.*, § 3730(b)(4)(A). If the Government chooses not to officially intervene, the relator has the right to proceed with the action in the Government's name. In either event, the Government retains the right not only to

recoup the lion's share of any recovery, but also to force dismissal of the action or impede any proposed compromise of the claim. *See id.*, §§ 3730(c)(2) and (3).

2. Relator James M. Churchill filed this *qui tam* action under seal on June 24, 1997, in the Western District of Texas, Pecos Division. Churchill alleged that defendants the State of Texas, Texas Department of Human Services, Texas Department of Health and Texas Health and Human Services Commission (hereafter collectively "the State Defendants") violated the FCA by submitting false claims to the United States under the federal Government's Medicaid program (referred to as "Medicaid").

The Medicaid program is highly regulated. Among the regulations to which state Medicaid programs are subject are those requiring states to identify and pursue collection from any third party who might be liable to pay for the care and services provided or available under the program. Monies collected from responsible third parties must be used to reimburse, first the federal Government, and then the State, for amounts expended for medical care under the Medicaid program. By regulation, federal financial participation, which exceeds sixty percent of the total Medicaid expenditures in Texas, is unavailable if a State fails to follow the regulations governing recovery of Medicaid funds from third-party sources.[1] Specifically, relator alleged that in violation of applicable laws and regulations, the State Defendants knowingly submitted claims for federal financial participation despite having failed to comply with the regulatory requirements governing third-party tort liability.[2]

1. *See* 42 C.F.R. § 433.140 (1997).

2. Relator also sued National Heritage Insurance Company ("NHIC"), with which the Texas Department of Human Services (Cont'd)

3. Pursuant to the United States' *ex parte* application for an extension of time to determine whether to intervene, the District Court extended the 60-day seal period to March 15, 1998. On March 16, 1998, after noting that the Government had not sought a further extension, the District Court ordered the clerk to unseal Churchill's complaint. The State Defendants were then served. The State Defendants moved to dismiss contending, first, that the State is not a "person" under the FCA, and second, that the Eleventh Amendment bars the suit. Churchill responded, as did the United States, which sought and obtained leave to file a brief in opposition to the State Defendants' motion to dismiss.

4. In an order filed June 4, 1998, the District Court denied the State Defendants' motion on both grounds. (App. 42a - App. 43a). The State defendants timely appealed. The District Court has stayed most of the proceedings below during the pendency of the appeal.

5. On October 21, 1998, the Fifth Circuit granted the United States' motion to intervene as a matter of right under 28 U.S.C. § 2403 as a plaintiff-appellant in the appeal so that it could defend the constitutionality of the *qui tam* provisions of the FCA as they applied to the State Defendants.

6. On March 29, 1999, a Fifth Circuit panel issued its opinion in *United States ex rel. Foulds v. Texas Tech*

(Cont'd)
(and later the Texas Department of Health) contracted to provide various services, including investigating, identifying and pursuing all third-party liability sources. Relator alleged, *inter alia*, that NHIC caused the submission of false claims by failing to pursue reimbursement from liable third-party tort-feasors.

University, 171 F.3d 279 (5th Cir.), *petition for cert. filed*, No. 99-513 (Aug. 27, 1999), a case presenting the same issues as the instant one. The Court in *Foulds* reversed the district court's denial of the State's motion to dismiss, holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court." *Id.* at 294. Because the Fifth Circuit determined that the Eleventh Amendment presented a "threshold jurisdictional issue," it did not address the statutory question also presented — whether the State is a "person" under the FCA.[3] *Id.* at 288, 294.

7. On August 5, 1999, another panel of the Fifth Circuit issued a three-paragraph unpublished opinion in the instant case, reversing the District Court's denial of the State defendants' motion to dismiss and remanding for entry of a judgment dismissing the claims against the State defendants. The panel's decision was based upon its determination that it was bound by the prior decision in *Foulds*, which it described as holding that the Eleventh Amendment bars qui tam suits against States in federal court when the United States has not actively intervened. (App. 2a).

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3. Under this Court's holding in *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-40 (1995), the Court of Appeals had no jurisdiction over the statutory question, which asserts a purported defense to liability. The Eleventh Amendment question, on the other hand, involves immunity from suit, a claim that is reviewable in an interlocutory appeal under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

REASONS FOR GRANTING THE WRIT

This case presents a question already at issue in *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (certiorari granted June 24, 1999) and presented in *United States ex rel. Foulds v. Texas Tech University*, No. 99-513 (petition for certiorari filed August 27, 1999). Both this case and *Stevens*, as well as *Foulds*, concern whether the Eleventh Amendment precludes a *qui tam* action if the United States initially does not intervene in the case. Accordingly, the Court's resolution of *Stevens* will govern the disposition of this case. The petition in this case should be held pending the decision in *Stevens* and then disposed of in light of that decision. Moreover, *Stevens* presents an additional question that, if the Court addresses it, may well be dispositive here. The Fifth Circuit declined to decide whether a State is a "person" under the FCA, an issue raised squarely in *Stevens*. The Court's resolution of both the Constitutional and statutory questions presented in *Stevens* will affect the outcome of this case.

I. THE CIRCUITS ARE IN CONFLICT OVER THE ELEVENTH AMENDMENT QUESTION HERE PRESENTED.

The Fifth Circuit's decisions in *Foulds* and in the instant case (which expressly follows *Foulds*) conflict directly with opinions of the Second, Fourth and Eighth Circuit Courts of Appeals.[4] Indeed, the Fifth Circuit stands alone in its holding

4. In an opinion later vacated on other grounds, the Ninth Circuit Court of Appeals also held that the Eleventh Amendment does not bar *qui tam* suits under the FCA. *See United States ex rel. Fine v. Chevron, U.S.A., Inc., et al.*, 39 F.3d 957 (9th Cir. 1994), *vacated en banc*, 72 F.3d 740 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1877 (1996).

that sovereign immunity bars suits by relators under the *qui tam* provisions of the FCA. *Compare Foulds*, 171 F.3d at 294 *with United States ex rel. Stevens*, 162 F.3d 195, 202 (2d Cir. 1998), *cert. granted*, 191 S. Ct. 2391 (June 24, 1999); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (June 21, 1999); *United States ex rel. Milam v. The University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48 (4th Cir. 1992). The analysis of and conclusion reached by the majority of the Circuits is unquestionably correct.

As framed by the Second Circuit, "[t]he question for the present case is whether a *qui tam* suit under the FCA should be viewed as a private action by an individual and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred." *Stevens*, 162 F.3d at 202; *see also Milam*, 961 F.2d at 48 ("The issue then is simply stated: is this a suit by the United States?"); *Rogers*, 154 F.3d at 868 ("We hold that a *qui tam* action under this Act is a suit by the United States for Eleventh Amendment purposes"). In answering this question, the Eighth Circuit, like the Second and Fourth Circuits, analyzed the FCA both in terms of its operation and its underlying purpose.

"The focus of the Act is on exposing fraud on the government and recovering resulting government losses. The *qui tam* provisions facilitate this process, but they do not alter the underlying character of the action as one for the aggrieved party as defined by the statute." *Rodgers*, 154 F.3d at 868. And the aggrieved party, as the Eighth Circuit and every other Circuit to have addressed the issue, including the Fifth, have concluded, is the United States. *Id*; *Stevens*, 162 F.3d at 202; *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir. 1997); *United States*

ex rel Hyatt v. Northrop Corp., 91 F.2d 1211, 1217 n.8 (9th Cir. 1996) (citing *Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993); *United States ex rel. Hall Dev. Corp.*, 49 F.3d 208, 1213 (7th Cir. 1995); *see also Milam*, 961 F.2d at 49 ("the structure of the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against the Center's position [that the Eleventh Amendment bars the action].").

In *Foulds* and in this case, the Fifth Circuit rejected the holdings and reasoning of its sister Circuits, choosing instead to adopt a crabbed and mechanical reading of both the Eleventh Amendment and the FCA. The Circuit focused solely on the "commences or prosecutes" language of the Eleventh Amendment and then narrowly construed the Government's role in *qui tam* cases, particularly in cases where the Government has not intervened. For example, the Circuit stated that "the [G]overnment retains *some* possessory rights to the proceeds of the suit," as if a seventy percent share of the damages, to which the Government is at a minimum entitled (31 U.S.C. § 3730(d)(2)), is an inconsequential amount. *Foulds*, 171 F.3d at 290 (emphasis added).

The Circuit contended further that the relator, not the United States, determines "how, when and in what matter to make demands on a state, . . . whether to settle with a state and on what terms, etc." *Id.*, 171 F.3d at 293. But, the United States, as the Fifth Circuit itself recently acknowledged, "is ever present" in *qui tam* suits, *see United States ex rel.*

Russell v. Epic Healthcare Management Group, __ F.3d __, __, 1999 WL 824560 at *3 (5th Cir. Oct. 14, 1999), as illustrated by its unequivocal statutory right to veto any settlement negotiated by a relator, even in cases where the Government has not intervened. *Searcy*, 117 F.3d at 159.

Similarly, the Fifth Circuit is wrong in asserting that the Government has no stake in *qui tam* suits in which it does not intervene simply because the Government is not presently footing the litigation costs. *Foulds*, 171 F.3d at 293. First, the Circuit, since deciding *Foulds* and the instant case, has recognized that the Government "receives the larger share of any recovery," even when it does not intervene. *Russell*, __ F.3d at __, 1999 WL 824560 at *2. Second, even when it does not intervene, the Government expends resources investigating the allegations made by relator. Indeed, the Government took an active role litigating the dismissal motion below, obtaining leave to file a brief in opposition to dismissal. Finally, in this case, the parties are required to serve the Department of Justice with all of the pleadings and motions.[5] The United States has committed resources to this litigation and has a stake in the outcome such that it has more than a "chimerical presence" in the case. *Foulds*, 171 F.3d at 293.

In fact, all *qui tam* cases, regardless of whether the Government intervenes, are cases that so involve the Government and its rights that, as a practical matter, they are brought and prosecuted by the United States. The FCA specifically requires that *qui tam* actions be "brought in the name of the Government." 31 U.S.C. § 3730(b)(1). *Qui tam* actions under the False Claims Act are authorized only to

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5. *See* 31 U.S.C. § 3730(c)(3).

recover funds wrongfully taken or withheld from the United States. The Government has suffered the injury the FCA remedies. *Kreindler & Kreindler*, 985 F.2d at 1154; *Milam*, 961 F.2d at 49. And, as noted, the vast majority of any money recovered by a *qui tam* plaintiff is returned to the United States Treasury. *See* 31 U.S.C. § 3730(d).

Even in cases where the Government elects not to intervene in a *qui tam* action, numerous provisions of the FCA make plain that the case is truly that of the United States. First, even if the Government declines to intervene initially, it may do so at any time during the course of litigation, upon a showing of good cause, and assert its primary authority over the prosecution of the action. *See* 31 U.S.C. § 3730(c)(3). Alternatively, the Government may seek to dismiss the action "notwithstanding the objections of the person initiating the action." *Id.* § 3730(c)(2)(A). If the Government allows the relator to conduct the litigation on the United States' behalf, the Government still retains the right to be kept informed of any or all aspects of the proceedings. *Id.* § 3730(c)(3). Finally, as noted, the Attorney General of the United States always retains the right to veto a *qui tam* plaintiff's effort to dismiss a case in which the Government has declined to intervene or to object to a settlement proposed on the Government's behalf. *Searcy*, 117 F.3d at 159-160.

This degree of Government involvement and control over a *qui tam* case, even when the Government does not intervene in the action, as well as the fact that the Government's property rights are at stake, led the Second, Fourth and Eighth Circuits to conclude that "a *qui tam* action under this Act is a suit by the United States for Eleventh Amendment immunity purposes." *Rodgers*, 154 F.3d at 868. The "real

party in interest" analysis used by those Circuits is firmly supported by cases in which this Court used such an analysis to determine whether a suit was being brought against a State and thus barred under the Eleventh Amendment, as well as whether a suit was brought by a State against another State and thus within the jurisdiction of federal courts. *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984) ("the general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought.") (emphasis in original); *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 464 (1945) ("when the action is in essence one for the recovery of money from the state, the state is the real, substantial party, in interest" even though private parties, who obviously are not themselves the State, are named as the defendants); *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904) (Because South Dakota held title to bonds at issue, it was real party in interest and could sue North Carolina in federal court); *New Hampshire v. Louisiana*, 108 U.S. 76, 89 (1883) (suit brought in the name of New Hampshire and New York barred because private parties were in legal effect prosecuting suit and would receive all monies collected through suit). The Fifth Circuit's decision to reject the "real party in interest analysis" conflicts both in its reasoning and outcome with the other Circuits to have considered the issue and this Court's recognition that the "real party in interest" analysis is determinative of Eleventh Amendment questions. These conflicts can only be resolved through the Court's review of the question presented by this case.

II. *BLATCHFORD v. NATIVE VILLAGE OF NOATAK* IS NOT APPLICABLE HERE.

The Fifth Circuit relied heavily on this Court's opinion in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991) in concluding that "Congress cannot delegate to private citizens the United States' sovereign exemption from Eleventh Amendment restrictions." *Foulds*, at 291-292. *Blatchford* did not so hold, however, and did not answer the question presented here, because that case involved an attempt by private individuals to sue a State to vindicate *their own rights*, rather than any rights of the United States as sovereign. *Blatchford*, 501 U.S. at 778. Moreover, under the FCA, Congress has not delegated its authority to sue States to private persons for their personal benefit alone; rather, Congress has authorized whistleblowers to take action in the name of the Government in order to benefit the Government.

The difference between delegation and representation distinguishes the circumstances in *qui tam* litigation from those addressed by the Supreme Court in *Blatchford*. There, the question raised was not whether the United States could empower private persons to act on the Government's behalf for purposes of pursuing the federal Government's claims, but whether the Government could assign to an Indian tribe *for the tribe's benefit alone* the United States' power to sue States. 501 U.S. at 785-786.[6] Because the Court concluded that Congress never intended to make such a delegation in the statute at issue, it did not decide whether Congress had

6. Similarly, the rights at issue in *Alden v. Maine*, 119 S. Ct. 2240 (1999) were solely those of the individual plaintiffs, who sought compensation and liquidated damages for the State's alleged violation of the Fair Labor Standards Act of 1938, 52 Stat. 1060, codified as amended at 29 U.S.C. § 201, *et seq.*

the authority to do so. *Id.* The Court's comments in *dictum* about whether States have consented to suit by "anyone the United States might select," *id.*, take on a fundamentally different meaning in the context of litigation where wholly private interests — and not the interests of the United States itself — are at issue.

Thus, *Blatchford* does not stand for the proposition that the federal Government cannot authorize private citizens to act on the Government's behalf. Indeed, the use of *qui tam* provisions predates the founding of the Union, and during the early years of the Union, such provisions were routine in federal and state legislation. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943). *See also* E. Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 342 & nn.2&3 (1989). While it is unknown when the first *qui tam* suit against a State was filed, it is beyond dispute that the concept that private persons could be recruited legislatively to represent the Government in litigation was well established at the time of the Constitutional Convention.

As the Second Circuit succinctly explained it, in *Blatchford*:

> Native American tribes sued the State of Alaska, arguing that they should be allowed to bring such a suit because the United States is empowered to bring a suit for the benefit of the tribes. Plainly in those circumstances, however, the injury to be remedied was one to the tribes, not to the federal government, and the cause of action did not belong to the government. The Supreme Court's rejection of the contention that the tribes should be allowed to pursue their own rights in suits

> against the States does not persuade us that the United States may not authorize a person other than the Attorney General to bring suit against the States on behalf of the United States to assist the United States in recovering moneys of which it has been defrauded.

Stevens, 162 F.3d at 203.

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, this petition should be held pending the decision in *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No 98-1828 (certiorari granted June 24, 1999) and *United States ex rel. Foulds v. Texas Tech University*, No. 99-513 (petition for certiorari filed August 27, 1999), and then disposed of as appropriate in light of the decision in those cases.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED AUGUST 5, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50605

UNITED STATES OF AMERICA, ex rel.,
JAMES M. CHURCHILL,

Plaintiff-Appellee,

versus

STATE OF TEXAS, ET AL,

Defendants,

STATE OF TEXAS; TEXAS DEPARTMENT OF HUMAN SERVICES; TEXAS DEPARTMENT OF HEALTH; TEXAS HEALTH & HUMAN SERVICES COMMISSION

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

Before JONES and WEINER, Circuit Judges, and LITTLE,* District Judge.

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* District Judge of the Western District of Louisiana, sitting by designation.

Appendix A

BY THE COURT:**

This appeal involves a *qui tam* action brought under the False Claims Act against the State of Texas and several state entities. This interlocutory appeal arises from the district court's denial of the state defendants' motion to dismiss on grounds of sovereign immunity. As all parties agree, the appeal is controlled by this court's recent decision in *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) ("when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court").

Accordingly, the district court's order denying the state defendants' motion to dismiss is REVERSED, and the case is REMANDED for the entry of a judgment dismissing the complaint as to the State of Texas, the Texas Department of Human Services, the Texas Department of Health, and the Texas Health and Human Services Commission.

REVERSED and REMANDED for Entry of Judgment Dismissing Appellants.

** Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, PECOS DIVISION ON MOTION TO DISMISS DATED JUNE 2, 1998

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

P-97-CA-57

UNITED STATES OF AMERICA, EX REL,
JAMES CHURCHILL

V.

THE STATE OF TEXAS, TEXAS DEPARTMENT OF HUMAN SERVICES, TEXAS HEALTH AND HUMAN SERVICES COMMISSION NATIONAL HERITAGE INSURANCE COMPANY, ET AL.

ORDER ON MOTION TO DISMISS

BEFORE THE COURT, in the above-captioned cause of action, is Defendant National Heritage Insurance Company's Motion to Dismiss Plaintiff's First Amended Original Complaint, filed April 20, 1998; Relator's Response, filed May 1, 1998; State Defendants' Motion to Dismiss, filed April 20, 1998; (Amended Motion, filed May 7, 1998); Relator's Response, filed May 1, 1998; State Defendant's Reply, filed May 15, 1998, and United States' *Amicus Curiae* Briefs in Opposition to Defendant National, filed May 8, 1998, and in Opposition to Defendant State of Texas, filed May 26, 1998. Each side briefed the issues quite

well, and they were written in the true spirit of advocacy. The Court has divided its analysis into several sections dealing with both Defendant National and State Defendants' Motions to Dismiss. After reviewing the Motions, the Court is of the opinion that the following lengthy decision is appropriate in support of its denial of the Motions to Dismiss.

I. STANDARD OF REVIEW

When reviewing a motion to dismiss for failure to state a claim, the Court may only grant the motion if "it appears beyond any doubt that the plaintiffs would not be entitled to recover under any set of facts that they could prove in support of their claim." *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Defendants in Rule 12(b)(6) motions "admit[ ] the facts alleged in the complaint, but challenge[ ] plaintiff's right to relief based upon those fact[s]." *Id.* (quoting *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir. 1966). Therefore this Court accepts as true all factual allegations in the pleadings." *Kansa Reinsurance Co., v. Congressional Mortg. Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994). The Court need not resolve unclear questions of law in favor of the plaintiff. *Id.* Moreover, a successful affirmative defense may also merit dismissal under Rule 12(b)(6). And finally, in order to avoid dismissal, the plaintiff must plead specific facts — not merely conclusory allegations. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1062 (5th Cir. 1994).

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II. PROCEDURAL AND FACTUAL BACKGROUND

In June of 1997, the Relator, James Churchill brought this action on behalf of the United States under the qui tam provisions of the False Claims Act ("the Act"). In his Complaint, he alleges that Defendants in failing to comply with federal regulations, fraudulently obtained funds to which they were not entitled, in violation of the Act. Pursuant to the provisions of the Act, the Relator's Complaint was placed under seal to allow the United States to conduct an investigation in order to determine whether to assume control of this particular litigation. *See* 31 U.S.C. § 3730. The Court permitted the case to be sealed until March of 1998. On March 13, 1998, the United States declined to intervene and the Relator thereupon promptly served the Complaint on Defendants. Defendants have filed no Answers, but instead have filed Motions to Dismiss which the Court now reviews.

Defendant National Heritage Insurance Company's ("Defendant National's") Motion contends that this case should be dismissed because the Complaint fails to allege a claim upon which relief may be granted and because the Complaint violates the requirements of the Fed. R. Civ. P. 9(b). The main argument of Defendant National's Motion is that the qui tam provisions of the Act, allowing private citizens to sue on the Federal Government's behalf, is unconstitutional. Defendant National also alleges in its Motion that the Relator has failed to plead his allegation of fraud with particularity, as required by Fed. R. Civ. P. 9(b).

State Defendants' Motion contends that this case should be dismissed because the State and its agencies are not

"persons" within the meaning of the False Claims Act and because State sovereignty bars this action against the State Defendants.

III. DISCUSSION

A. THE FALSE CLAIMS ACT AND ITS CONSTITUTIONALITY

The Court, in its review of the case law, has learned that the favorite attack on the False Claims Act is an attack on its constitutionality based upon standing and a separation of powers argument.[1] The False Claims Act, 29 U.S.C. § 3730 was originally enacted in 1863 and was amended first in 1943 and then in 1986.[2] Under all versions, the Act has provided

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1. "The layman's Constitutional view is that what he likes is Constitutional and that which he doesn't like is unconstitutional. That about measures up the Constitutional acumen of the average person." DAVID SHRAGER AND ELIZABETH FROST, THE QUOTABLE LAWYER, 60 (1986) (quoting Hugo L. Black, N.Y. TIMES, Feb. 26, 1971). The Court is of the opinion, however, that this view is certainly not limited to laymen.

2. The practice of law is actually a practice of history as the American origins of the False Claims Act demonstrates: At the time the Act was born, the nation was going through a civil war. The War Department also found itself dealing with unscrupulous and corrupt government contractors who were fast becoming "proverbially and notoriously rich" at the government's expense. *United States ex rel. Newsham v. Lockheed Missiles and Space Co., Inc.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting 1 F. SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 1861-1865, (Cont'd)

for civil actions on behalf of the United States government in order to recover damages and civil penalties for false claims made to the federal government.[3] The qui tam

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at 54-56 (1965). "For sugar, [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *Id.* At President Lincoln's urging, along with the proof of widespread fraud, Congress enacted the Act and authorized suits to "be brought and carried on by any person as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States." *Id.* (quoting Act of March 2, 1863, ch. 67, 12 Stat. 696).

3. **The False Claims Act provides in part:**

(a) Liability for certain acts. — Any person who —

> 1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;
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> 2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
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> 3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

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> 4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
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> 5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
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> 6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government . . . who lawfully may not sell or pledge the property; or
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> 7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government.

31 U.S.C. § 3729(a) (1998).

The 1986 amendments essentially increased the penalties assessed against violators, raised the percentage of recovery available

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provisions of the Act allow private citizens to act as "whistle blowers" and to enforce the statutory requirements on behalf of the federal government and the individual. *See* 31 U.S.C. § 3730(b)(1). The qui tam plaintiff is referred to as the "relator" since he or she "relates" or informs the government of the fraud in question. *See* Kaz Kikkawa, *Medicare Fraud and Abuse and Quit Tam: The Dynamic Duo or the Odd Couple?*, J.L.-Med. (Winter 1998). Usually, parties which contract with the federal government are liable if they knowingly provide false claims to the federal government. The lawsuit is actually brought in the name of the United States, and the government is then given the choice between assuming control of the case or allowing the relator to proceed with the lawsuit. *See* 31 U.S.C. § 3730(b)(2). The

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to the relator, lowered the burden of proof to a preponderance of the evidence, lowered the standard of knowledge in that the defendant's actual knowledge of falsity or reckless disregard of the truth or falsity is sufficient to create liability; and allowed the relator to continue the suit even if the Government refrains from intervening.

The definition of a "claim" includes:

> any request or demand, whether under contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient of the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c).

government fully retains the right to intervene for good cause shown at any later point in the case. *See id.* at § 3730(c)(4). As required by the Act, the complaint is filed under seal for at least 60 days, and the relator initially serves the United States and not the defendant. A jurisdictional requirement of the relator's suit is that the suit must rest upon information *not* in the possession of the United States prior to the filing of the action. *See* 31 U.S.C. § 3730(e)(4)(A).[4]

1. WHETHER QUI TAM RELATORS HAVE STANDING TO SUE

Defendant National contends that the qui tam provisions of the Act violate the Article III standing requirements of the U.S. Constitution and the principle of separation of powers.[5]

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4. This is the "original source" requirement and "original source" is defined as:

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(c)(2)(B).

31 U.S.C. § 3730 bars all other suits based on the same facts. "Qui tam suits are meant to encourage insiders privy to a fraud on the Government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot. . . . A 'whistleblower' sounds the alarm; he does not echo it." *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

5. Naturally, if the government had, indeed, elected to intervene in this suit, then standing would not even be an issue. But alas, standing has been made an issue in this case.

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Article III limits jurisdiction of the federal courts to those cases which present "cases and controversies." The doctrine of standing is essentially used to determine whether a conflict qualifies as a case and controversy and is therefore capable of judicial resolution. *See Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). The doctrines of justiciability which limit a federal court's jurisdiction stem from the policy of the separation of powers. *See Allen v. Wright*, 468 U.S. 737, 752 (1984). Specifically, these Article III limits on federal court jurisdiction act as a balance in the three-branch system of government. As the Supreme Court has held, "the law of Art. III standing is built on a single basic idea — the idea of separation of powers." *Id.* at 752. Furthermore, the standing requirement ensures that the courts maintain their correct position in this democratic society by requiring that cases are not only presented in an adversarial context but also are capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Standing, one of the most important doctrines of justiciability, is dependent upon three conditions. *See United States ex rel Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tex. 1997). First, the plaintiff must allege a distinct injury to him or herself, "even if it is an injury shared by a large class of possible litigants." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The purpose of this requirement is to ensure that the federal courts adjudicate real issues. Second, there must be some casual connection between the injury-in-fact and the conduct serving as the basis for the lawsuit. Third, there must be a likelihood that the injury will be redressed by a favorable decision. This standing requirement acts as a routine threshold requirement which is of

fundamental importance in litigation. The requirement limits the types of issues which may be brought before the courts. Naturally, this standing, or "case and controversy" requirement is of particular importance in this day and age with its increasing number of challenges to federal statutes and the expenditure of public funds. If the court decides that the party bringing the action is not sufficiently associated with the controversy, then the court is prohibited by Article III from hearing the action.[6]

In this particular case, Defendant National states that the Relator has no injury-in-fact, and therefore has no standing to sue. The Court agrees that some injury-in-fact must be alleged in order to satisfy constitutional requirements. While Congress cannot statutorily waive this constitutional minimum, the Court finds that the Act

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6. Courts have refused to recognize standing of private citizens seeking review of the executive branch's conduct where the citizens have failed to demonstrate personal injury. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984) (finding that standing could not be predicated upon a claim of stigmatization caused by racial discrimination); *Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (finding that the plaintiffs' injury of being deprived of the fair and constitutional use of their tax dollars did not constitute actual injury beyond a generalized grievance — something common to all taxpayers); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (finding that plaintiffs as taxpayers have no standing with respect to action challenging armed forces reserve membership of members of Congress); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (finding that conservation organization lacked standing as it only had a mere interest in an environmental problem).

effectively assigns the government's claims to the qui tam relator.[7]

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7. As one can tell by the following endless list of citations, this statutory grant of standing has been overwhelmingly validated by numerous federal courts, as well as implicitly by the Supreme Court with the unique exception of the recent District Court ruling in *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tex. 1997). *See e.g.*, *United States ex rel. Marcus v. Hess*, 317 U.S. at 541 ("Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts."); *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (stating historical existence of such suits); *United States ex rel. Kelly v Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1125 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1992), *cert. denied*, 508 U.S. 973 (1993); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993); *United States ex rel. Woodard v. Country View Day Care Center, Inc.*, 797 F.2d 888, 893 (10th Cir. 1986) ("The statute of course eliminated any standing problem."); *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1376-77 (D.C. Cir. 1981) ("Congress authorized private citizens to bring civil actions against wrongdoers on the Government's behalf . . ."), *cert. denied*, 455 U.S. 999 (1982); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 46 (5th Cir. 1977) (relator has standing in suit even if government elects not to join), *cert. denied*, 434 U.S. 1035 (1978); *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.) ("Congress can constitutionally enact a statute conferring any non-official person . . . authority to bring suit . . ."), *cert. denied*, 319 U.S. 739 (1943); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 836 (N.D. Ill. 1993) (finding qui tam provisions as not violating Article III); *United States ex rel. Burch v. Pique Engineering*, 803 F. Supp. 115 (S.D. Ohio 1992); *United States ex rel. U.S.-Namibia Trade & Cultural Council, Inc. v. South West Africa People's*

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Qui tam lawsuits certainly satisfy the Supreme Court's concerns of the adjudication of cases which fail the case and controversy requirement of Article III. Qui tam lawsuits are clearly presented in the traditional adversarial context in that they involve concrete factual disputes which prevent the federal courts from being converted into "judicial versions of college debating forums" issuing nothing but opinions. *Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982). Qui tam lawsuits are also clearly capable of judicial resolution in that they involve allegations of fraud against the government, and by resolving these allegations, the courts are rendering

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Organization, 585 F. Supp. 632, 633 (S.D.N.Y. 1984) ("the Act confers standing on any person to bring a qui tam action . . ."); *Public Interest Bounty Hunters v. Board of Governors*, 548 F. Supp. 157, 161 (N.D. Ga. 1982) (finding that qui tam statutes "provide a private citizen . . . with an interest sufficient to give that individual the standing to sue . . ."); *Calderwood v. Mansfield*, 71 F. Supp. 480, 481 (N.D. Cal. 1947) ("injury to private interest is not pertinent" in a qui tam action);

The *Riley* Court, on the other hand, clearly held and this Court clearly but respectfully disagrees that Congress cannot constitutionally confer standing on a qui tam plaintiff who has suffered no cognizable claim. The Court also rejected the argument that the relator's injury includes a cash bounty and the possibility for facing costs if the case if found to be frivolous. As the United States *Amicus Curiae* Brief points out, two months after the *Riley* ruling, another court in the same district rejected the *Riley* Court's reasoning and followed the Fifth Circuit's reasoning that the standing issue is a non-issue in that the Act "grants informers standing to sue and an award for successful actions under the statute." *Weinberger*, 557 F.2d at 460.

justice. Congress has quite clearly authorized the qui tam relator to sue in the name of the government, to sue as "representatives of the public interest." *Flast*, 392 U.S. at 120 (Harlan, J. dissenting).[8] Congress may certainly create a legal interest and then subsequently confer standing in order to assert that interest. *See Traficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-09 (1972). Once Congress creates this statutory standing, the particular limitation that the plaintiff's injury be personal and distinct is not considered by the Court acting as gatekeeper. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). However, Congress cannot, and does not in this Act, waive the constitutional minimum of injury-in-fact.

Assuming in the Relator's favor that Defendants did commit fraud, there is no doubt that the government has been injured. As the name qui tam infers,[9] the relator brings the

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8. The issue of standing in the qui tam lawsuit has not been directly addressed by the Supreme Court as of yet. However, the Supreme Court has implicitly addressed the issue in *Marcus*, 317 U.S. at 541 and *Marvin*, 199 U.S. at 225 (ratifying a qui tam plaintiff's standing by stating that an informer had a right to sue for recovery even though they had no interest whatsoever in the controversy than that given by statute.).

9. The Court rarely demonstrates its expertise in foreign languages by quoting Latin. An exception is going to be made in this case: "Qui tam" is an abbreviation of the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur" which means "who sues on behalf of the King as well as for himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990). Black's Law Dictionary continues in its definition:

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suit in the name of, standing in the shoes of, the injured government. Essentially, the Act creates a de facto assignment of the government's interest in the suit, and therefore, the relator has standing to sue in place of the government. *See Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997) (finding that the government is the real party in interest, even if it elects not to intervene); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (1977) (finding that the Act gives standing to informers). The government, at all times throughout the lawsuit, remains the real party in interest, not the Relator.

In a case where there is evidence of injury-in-fact to the entity on whose behalf and in whose name the lawsuit is brought, it would be superfluous to require a relator to allege an additional injury. However, assuming, for the sake of argument, that Congress had overstepped its constitutional bounds by conferring standing upon a relator or assuming that the relator must allege injury-in-fact, in addition to the government's alleged injury, the Relator in this case still meets the standing requirement. Again assuming the fraud

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> It is an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution. It is called a "qui tam action" because the Plaintiff states that he sues as well for the state as for himself.

Id.

as true, the Relator has arguably suffered injury. The Act's bounty gives the Relator a personal stake in the outcome of the suit.[10] Furthermore, the Relator in this case was a staff attorney for the Defendant Texas Department of Health, and if the fraudulent conduct is true, he has suffered personal injuries in that he possibly faced termination upon the filing of his complaint, or if he had ignored the presence of fraud in his work environment, he possibly faced prosecution. Therefore, the alleged fraudulent action has created a direct injury-in-fact for the Relator. *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1099 (C.D. Cal. 1989) (finding that cash bounty, termination, suspension are injury-in-fact). *See also United States ex rel. Burch v. Piqua Engineering*, 803 F. Supp. 115 (S.D. Ohio 1992) (finding the potential ramifications to the employment status of the relator as injury-in-fact); *cf. United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989) (finding that ramifications to employment status is

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10. The Act's bounty is unlike an award of attorney's fees in that an attorneys' fees award "is wholly unrelated to the subject matter of the litigation, and bears no relation to the statute whose constitutionality is at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986). The bounty, on the other hand, is "inextricably intertwined with the underlying lawsuit" which creates "a concrete identifiable interest that falls within the confines of Article III." *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1099 (C.D. Cal. 1989).

The Act states that if the government does participate, then the relator will receive no less than fifteen and no more than twenty-five percent of the bounty. 31 U.S.C. § 3730(d)(1). If the government chooses not to join, the recovery is set at twenty-five to thirty percent. *Id.* § 3730(d)(2)( ).

speculating harm and the basis for standing lies with the injury to the government).

In *Lujan v. Defenders of Wildlife*, the Supreme Court, while denying standing under the Endangered Species Act, 16 U.S.C. § 1531 (1988), distinguished "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." 112 S.Ct. at 2143. The case at hand is one of those unusual cases.

The Court finds that the Relator has placed a concrete, identifiable claim for fraud against the government, and that Congress, pursuant to its policymaking authority has placed the pursuit of relief of such fraud in the hands of the qui tam relator. Thus, this Court finds that the Act confers upon qui tam relators standing to bring suit, thereby satisfying the threshold requirement of a case or controversy under Article III of the Constitution. Alternatively, if the Relator was still required to demonstrate injury-in-fact to himself in order to meet the constitutional threshold, he still satisfies the standing requirement.[11] Accordingly, Defendant National's claim that the Relator does not have standing to bring this suit is without merit, and should be denied.

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11. The United States as *Amicus Curiae* also makes a good argument that the qui tam action is analogous to a chose in action. *See United States' Amicus Curiae Br. in Opposition to Def. National's Mot.* at 7-12.

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2. WHETHER THE QUI TAM PROVISIONS VIOLATE THE PRINCIPLE OF SEPARATION OF POWERS.

Congress has enacted laws which confer substantive rights on private citizens, and those laws, in turn, authorize private citizens to protect those rights in the judicial system.[12] By referring to these past examples, this Court is not stating that just because Congress has done something in the past, then Congress is right this time. Instead, this Court is stating that the qui tam provisions, just like those past examples, do not encroach upon the Executive Branch's powers, and therefore, there is not a separation of powers problem. Sad as it is to state, in this day and age there is a great deal of fraud occurring which affects every taxpayer's pocketbook. Congress obviously has the power to protect the government

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12. Examples of other federal statutes which authorize individuals to bring claims under the provisions as "private attorneys-general" include: 5 U.S.C. § 552(a)(4) (Freedom of Information Act); 5 U.S.C. § 552a(g)(2)(B) & (g)(3)(B) (Privacy Act); 15 U.S.C. §§ 2618, 2619 (Toxic Substances Control Act); 25 U.S.C. §201 (recovery of penalties for violation of Indian protection laws); 29 U.S.C. §1001 (Employee Retirement Income Security Act of 1974); 29 U.S.C. § 216(b) (Equal Pay Act of 1963); 33 U.S.C. §§ 1365, 1369 (Clean Water Act); 35 U.S.C. § 292 (penalties for patent infringement); 42 U.S.C. § 1988 (Civil Rights Attorneys' Fees Award Act of 1976); 42 U.S.C. § 2000e-5(k) (Title VII of the Civil Rights Act of 1964); 42 U.S.C. §3613(c) (Fair Housing Act); 42 U.S.C. §6972 (Resource Conservation and Recovery Act); 42 U.S.C. §§ 7604, 7607 (Clean Air Act); 42 U.S.C. § 9659 (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. § 12205 (Americans with Disabilities Act of 1990).

from fraud, but it just as obviously does not have the manpower to successfully pursue each claim.[13] The Act, by enlisting private citizens to sue on its behalf, is the government's attempt to recover a fraction of those losses.

a) Purpose of Separation of Powers

The principle of separation of powers is a fundamental part of the United States government. The Supreme Court has consistently "given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). At the same time, though, "the Constitution by no means contemplates total separation" of the three branches of government. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). *See also Morrison v. Olson*, 487 U.S. 654, 694 (1988). The separation of powers doctrine can be violated by provisions of law which either "accrete to a single branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Mistretta*, 488 U.S. at 382. The latter type of violation is arguably at stake at this

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13. The legislative history shows that Congress intended to encourage private enforcement mainly because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. Rep. No. 345, 99th Cong., 2d Sess., at 3 (1986).

case. However, the qui tam provision do not in any way constitute a violation of the principle.

Article II of the Constitution vests all Executive power in the President and requires the Executive to faithfully execute the laws. U.S. CONST. art. II, §§ 1,3. The Constitution does not mandate the unrealistic expectation that the three departments of government remain entirely free from and separate from each other. The branches work best when they are separate, yet interdependent, autonomous, yet reciprocal. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J.).

The Supreme Court has established that when an act of Congress is accused of threatening the integrity of another branch's authority and independence, the proper separation of power inquiry is whether Congress has "impermissibly undermined" the role of that branch. *Commodity Futures Tracking Com'n v. Schor*, 478 U.S. 833, 856 (1986). Therefore, the question here is whether the qui tam provisions disrupt the balance between the branches by preventing the Executive Branch from performing its constitutionally assigned duties.

b) The Qui Tam Provisions & the Separation of Powers Principle

In answering that question, the Court finds that the qui tam provisions of the Act are in tune with the constitutional principle of separation of powers. The provisions have been carefully drafted with the intention to maintain the Executive Branch's clear ability to prosecute false-claims actions even

when initiated by a private citizen. The Executive Branch maintains "sufficient control" over the relator's handling of the case to "ensure that the President is able to perform his constitutionally assigned duties." *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (quoting *Morrison*, 487 U.S. at 696). In the case of *Morrison*, the Supreme Court was faced with a separation of powers challenge to the independent counsel provisions of the Ethics in Government Act of 1978. The Ethics in Government Act creates a special division of the federal court of appeals for the District of Columbia which is empowered to appoint an independent counsel and to define his prosecutorial jurisdiction. The Supreme Court found that the Ethics in Government Act did not undermine the Executive Branch's ability to perform its constitutionally assigned functions since the Attorney General retains control over the independent counsel.

In the original version of the False Claims Act, the government was not afforded the right to intervene and take over the lawsuit after the relator had commenced the suit. The 1986 versions of the Act, however, gave the Executive Branch greater control over the qui tam lawsuit. Likewise, the 1986 version of the qui tam provisions of the Act provides that the Executive Branch maintains controls over the litigation, if it so chooses.

The First Congress incorporated the concept the qui tam action into American law, and historians would likely infer that that fact "provides contemporaneous and weighty evidence" that the qui tam concept is consistent with the constitutional principle of separation of powers. *Stillwell*,

714 F. Supp. at 1086 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)).[14] The Act cannot be declared

14. The Supreme Court has stated that:

> Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts. . . . Congress has the power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the . . . statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will.

Marcus, 317 U.S. at 541-42. Since the Supreme Court's holding in *Marcus*, the amendments to the Act have made the Act even more favorable.

The Supreme Court in the *Marcus* case made an interesting comment on the constitutionality of the Act:

> It is said that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that was interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed in the wrong forum.

Marcus, 317 U.S. at 547.

unconstitutional based upon the allegation that it violates the doctrine of separation of powers. In no way does the Act deprive the Executive Branch's ability to enforce the law by allowing the relator (or judicial branch) to have full control of the lawsuit. While the Executive Branch does not maintain absolute control over the relator's suit, the Act clearly allows the government, at any time, to move to intervene in the lawsuit's proceedings. Throughout, the entire lawsuit, the government may elect to be served with all of the pleadings and deposition transcripts so that it may monitor the relator's handling of the suit. 31 U.S.C. § 3730(c)(3). Furthermore, if the government chooses to intervene, it retains the ability to settle or even move to dismiss the action — even if the relator objects.[15] If, on the other hand, the relator and defendant negotiate a settlement, the government may elect to intervene

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15. A court may dismiss an action, at the government's request, but the relator is permitted to voice its objections to such request before the court takes action. 31 U.S.C. § 3730(c)(2)(A) – (B).

Searcy v. Philips Electronics North America, found that the government has the absolute power to veto voluntary settlements in qui tam suits under the Act. Judge Higginbotham found that although the statute gives the relator the "right to conduct the action" he also found that the statute may be dismissed only if the court and the Attorney general give written consent to the dismissal and their reasons for dismissal. 117 F.3d 154 (5th Cir. 1997). This Fifth Circuit finding has created a split in the circuits.

The Ninth Circuit in *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994), *cert. denied*, 117 S.Ct. 296 (1996) found that the government's consent is only required during the initial 60-day period in which the government determines whether to intervene.

if it finds that the terms of the settlement are unacceptable, provided good cause is shown for such intervention. *Id.* at § 3730(c)(3).[16] The government also retains the ability to stay discovery upon a showing that the relator's efforts in the civil action would interfere with another governmental investigation. *Id.* at § 3730(c)(4). The government may also request that the court impose limitations on the relator's participation if it shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." *Id.* at § 3730(c)(2)(C).[17]

It appears to this Court that the Act quite clearly permits a private citizen to sue on behalf of the government while just as clearly allows the government to not only monitor the suit but ultimately control or determine its outcome, upon

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16. *Morrison* also found that the provision in the Ethics in Government Act requiring the Attorney General to show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by possibly permitting excessive judicial involvement. *See Morrison v. Olson*, 487 U.S. 654, 691. Likewise, this Court finds that requiring the government to show good cause in certain motions in a qui tam suit does not permit excessive judicial involvement.

17. Unlike the Ethics in Government Act, the False Claims Act does not give the government as much control over the initiation and prosecution of the case in that the Attorney General cannot in a qui tam case appoint an individual of his or her choice, determine counsel's jurisdiction, or remove the counsel at will. Nonetheless, the government still exercises a significant amount of control over the qui tam relator as it can over the independent counsel.

leave of the court. The traditional Article III separation of powers policy concerns are not pushed aside in any manner by allowing qui tam suits under the Act. These suits do not intrude into areas committed to other branches of the government.

In sum, the Act grants the executive branch significantly greater control than that provided for in the Ethics in Government Act of 1978 and which the Supreme Court validated in *Morrison*.[18] Therefore, in accordance, the challenge based upon the separation of powers concern will not prevail.

B. THE FAILURE TO PLEAD FRAUD WITH PARTICULARITY

Defendant National moves for dismissal of the lawsuit under Fed. R. Civ. P. 9(b) because the Relator has failed to plead its case of fraud with particularity.[19]

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18. For a detailed overview of the provisions of the Ethics in Government Act, see *Kelly*, 9 F.3d 743.

19. Rule 9 of the Federal Rules of Civil Procedure provides as follows:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED. R. CIV. P. 9(b).

Appendix B

Rule 9(b) imposes a heightened pleading requirement for allegations of fraud. The Rule provides that averments of fraud shall be stated "with particularity." Fed. R. Civ. P. 9(b). The Fifth Circuit has required that "Rule 9(b) requires allegations of the particulars of time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Sushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993). The purpose of the rule is to place the defendant on notice of the precise misconduct of which it is charged. A determination of what constitutes adequate "particularity" depends upon the facts of each case. This particularity requirement may be relaxed if a defendant controls the information required for proper pleading. *See, e.g.*, *United States ex rel. Sanders v. East Alabama Healthcare Authority*, 953 F. Supp. 1404 (M.D. Ala. 1996); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830 (N.D. Ill. 1993) (finding that plaintiffs must describe the outline of the fraudulent scheme and facts identifying the who, what, when, and where of the fraud). However, the complaint should still adduce specific facts supporting a strong inference of fraud to satisfy the relaxed standard.

This Court finds that the standard for pleading fraud under the Act is not a strict application of the Rule 9(b). The Rule requires that "the circumstances constituting fraud . . . shall be stated with particularity," and is to be read in conjunction with Rule 8. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 959 (D.C. Cir. 1985). *See also* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1298 (1990 & Supp. 1998) ("Perhaps the most basic consideration in making a judgment as to the

sufficiency of a pleading is the determination of how much detail is necessary to give adequate notice to the adverse party . . . it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud.").[20] The pleadings, however, cannot be based on speculation and belief unless the factual information is "peculiarly within the defendant's knowledge and control." *United States ex rel. Wilkins v. Ohio*, 855 F. Supp. 1055, 1061 (S.D. Ohio 1995). *See also United States ex rel. Long v. SCS Business & Tech. Inst.*, 1998 WL 151290 (D.D.C. Mar. 26, 1998); *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 273 (N.D. Tex. 1990) (finding that Rule 9(b) may be relaxed when matters are within the opposing party's knowledge). In such a case, pleading on formation and belief is acceptable. *Stinson*, 755 F. Supp. at 1056-57. A strict enforcement of Rule 9 would simply frustrate the purpose of the Act.

In this case, Defendant National contends that the Complaint is woefully deficient in providing the details

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20. Rule 8 provides in relevant part:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8.

regarding the alleged fraud. Specifically, Defendant National alleges that "Churchill has not alleged any specific instance in which [National] failed to pursue, on a cost-effective basis, recovery from third parties. . . . Churchill has not alleged any document prepared by [National], and submitted to the United States Government in connection with a claim for fees. . . Churchill must identify actual Medicaid claims . . ." *Def. National's Mot. to Dismiss*, at 6-7.

The Court finds that the Relator has satisfied the rule's requirement in that he places the Defendant National on notice of the precise misconduct which spanned over a course of several years of which it is charged.[21] In his Complaint, he identifies the fraudulent act and the violation of government law, and he identifies the defrauding parties and their roles in the fraud. It appears to the Court that the qui tam plaintiff in the initial complaint would be unable to provide such detail as to the exact claim made, the date of the claim, etc., especially as in this case, where the Relator has left employment with Defendant, and the Court doubts that the Relator was able to take the required documents with him. The Relator, however, must give a reasonable

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21. Although the Court refrains from presenting a paragraph by paragraph analysis, the following are examples of the Complaint's contents: Paragraphs 24-28 & 31 of the Relator's Complaint state the general scheme of fraudulent conduct among Defendants; paragraph 29 establishes the specific contract Defendant National entered into with Defendant Texas Department of Health and Services; paragraph 30 presents allegations that Defendant National received premiums for which it was not entitled; paragraphs 33-36, 39-48 describe the facts surrounding how Relator discovered that collections received from subrogation in tort cases was substantially low as compared to the potential.

delineation of the specifics of the false claims so that exact proof may be obtained through the discovery process. The Relator in this case has not placed Defendant National on a fishing trip based on a belief that fraud may have occurred. Instead, the Relator has given Defendant National more than adequate notice of the alleged fraud at this stage of the game in order to support a claim for fraud.

The Court shall deny Defendant National's Motion to Dismiss for failure to plead fraud with particularity.

C. FAILURE TO STATE A CLAIM UNDER THE FALSE CLAIMS ACT

Defendant National asserts that the Relator's Complaint alleges "reverse false claims" and that such claims arise when an entity is accused of submitted under-payments to the government as opposed to submitting false claims for payment from the government. *See* 31 U.S.C. § 3729(a)(7). The Relator in his Response asserts that his Complaint alleges violations of 31 U.S.C. § 3729(a)(1), (2), (3) *and* (7). *Relator's Resp. to Def. National's Mot. to Dismiss*, at 4. The Relator states that the fact that the claims were made to the State of Texas rather than directly to the United States government is irrelevant since such claims still fall under the territory of the Act's definition of a claim. *Id.*

The Relator states that the Defendant National is wrong in asserting that the Complaint is based upon "reverse false claims."[22] The Court assumes that the Relator is more familiar

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22. Reverse false claims are claims in which a defendant allegedly reduced the payment owed to the government through some fraudulent means as opposed to submitting a fraudulent claim for payment to the government. 31 U.S.C. § 3729(a)(7).

with his own Complaint than is Defendant National. Likewise, the Court shall accept all pleaded facts as true and shall construe the Complaint in the Relator's favor. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). There is no doubt that the Act is intended to remedy all fraudulent attempts to cause the government to pay out money. S. Rep. No. 345, at 9; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943). The Act has also been held to reach conduct which results in losses to the government, even though the defendant did not actually made a demand for the money. *See Long*, 1998 WL 151290, *12 (citing *United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983)). The Act has also been held to include conduct where a defendant caused others to present false claims to the government. *Id.* 811 (citing *United States v. Teevan*, 862 F. Supp. 1200, 1223 (D. Del. 1992)). Once again, the Act reaches all parties who engage in fraudulent conduct against the United States.

The Court, therefore, follows the Relator's argument that an entity is still liable under the Act even if it submits false claims to a recipient of federal funds and the claims are then paid from federal funds. *See United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1146-47 (S.D. Cal. 1976).[23] The Relator has alleged, with requisite specificity

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23. Furthermore, the Court is reminded of the definition of a "claim" as being "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient of the United States Government provides any portion of the money or property which is requested of demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

at this time, that Defendant National allowed false claims to be presented to the federal government over a number of years.

In essence, the Court shall deny Defendant National's Motion to Dismiss for failure to state a claim.

D. SOVEREIGN IMMUNITY

The State Defendants assert that the State and its agencies cannot be sued in federal court without their consent or without a clear abrogation of their immunity by Congress. The State Defendants concede that a state's sovereign immunity is not an issue in a suit by the federal government against the state. However, they assert that this particular case raises the question whether Congress can extend the federal government's authority to bring suit against a state to authorize private party litigation without violating the Eleventh Amendment. In relying upon *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), State Defendants infer that Congress has no power to abrogate a state's sovereign immunity by permitting a private party to commence and prosecute a suit against the State. They also assert that the Eleventh Amendment can only be by-passed in a suit in which the United States is the party who commences and prosecutes the action. *See Blatchford*, 501 U.S. at 784.

In this Court as in most of the federal courts, the scope and application of Eleventh Amendment continues to be a source of debate.

Appendix B

The Constitution of the United States provides the following:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend XI.

The plain language of the Eleventh Amendment prohibits suits in federal court by citizens of one State against another State or by aliens against any State. In addition, the Supreme Court has construed the Amendment to prohibit suits against States by their own citizens. *See Hans v. Louisiana*, 134 U.S. 1 (1890); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982). Furthermore, the Supreme Court has also construed the Amendment to prohibit suits against States by foreign States or sovereigns. *See Monaco v. Mississippi*, 292 U.S. 313, 330 (1934); *Blatchford*, 501 U.S. 775, 778 (1991) (recognizing the sovereignty of Indian Tribes).

The Eleventh Amendment bar to suits against States is bypassed, however, under the following circumstances:

(1) when the State has waived immunity and consented to the suit. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Papasan v. Allain*, 478 US. 265, 276 n.10 (1986); or

(2) when Congress has clearly expressed its intent to abrogate or limit that immunity through legislative authority. *See Quern v. Jordan*, 440 U.S. 332, 333-334 (1979); or

(3) when the suit is instituted under a fiction which allows suits for prospective injunctive relief against a State official in vindication of a federal right. *See Ex parte Young*, 209 U.S. 123 (1908).

A State's waiver of its Eleventh Amendment immunity may be found "only where stated 'by the most express language or by such overwhelming implications from the text as [would] leave no room for any other reasonable construction.' " *Edelman*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)); *see also Ex parte State of New York*, 256 U.S. 490 (1921).

Congressional resolution to abrogate or limit a State's Eleventh Amendment immunity must be clear by "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (quoting *Quern*, 440 U.S. at 342).

As State Defendants agree, a state's sovereign immunity is not an issue in a suit by the federal government against the state. *See West Virginia v. United States*, 479 U.S. 305 (1987); *United States v. Mississippi*, 380 U.S. 128 (1965). However, where the government is not a party, as in this case, State Defendants argue that they are protected against suit by sovereign immunity.

Thus, the Court and State Defendants would likely agree that if the Relator's action against State Defendants is considered a suit by the United States, then such suit would not be barred by the Eleventh Amendment.

The Fourth Circuit, in *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46 (4th Cir. 1992) held that even when the government elects not to intervene, it remains the real party in interest, and therefore, the sovereign immunity defense is unavailable. "[T]he structure of the qui tam procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against the [defendant's] position." *Id.* at 49. The Fifth Circuit in *Searcy* followed the Fourth Circuit's holding that the government is the real party in interest. *Searcy*, 117 F.3d at 156 (finding that the government is the real party in interest and therefore, *Seminole Tribe* has no bearing). *See also United States ex rel. Foulds v. Texas Tech Univ.*, 980 F. Supp. 864 (N.D. Tex. 1997) (finding state sovereignty as non-issue as qui tam suit is one by government against state).

The Second Circuit, in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, 508 U.S. 973 (1993), found that the government remains the real party in interest. The Court in *Kreindler* did not address whether sovereign immunity was a valid defense because it found that since the relator was not the original source of the fraud, it lacked standing.

The Ninth Circuit in *United States ex rel. Fine v. Chevron, U.S.A., Inc.* concluded that "in a qui tam action,

the government is the real party in interest." 39 F.3d 957, 963 (1994) (quoting *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994)).

The District of Columbia, in *United States ex rel. Long v. SCS Business & Technical Institute* clearly found that "[the] Eleventh Amendment is not a bar to an FCA [False Claims Act] action because the United States is always the plaintiff in a *qui tam* action and the Eleventh Amendment does not prohibit suits by the United States against States in federal court." 1998 WL 151290, *3 (citing *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892) (noting that state compliance with federal law is ensured by the fact that the federal government can sue a state in federal court for a violation of federal law))).[24]

The Supreme Court in *Seminole Tribe* determined that the Eleventh Amendment prohibited Congress from allowing suits by Indian tribes against the States for prospective relief.

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24. The District Court of Columbia stated that states are often defendants in qui tam suits under the Act: *United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama*, 104 F.3d 1453 (4th Cir.), *cert. denied*, 118 S.Ct. 301 (1997); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr*, 961 F.2d 46 (4th Cir. 1992); *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980); *United States ex rel. Wilkins v. Ohio*, 885 F.Supp 1055 (S.D. Ohio 1995); *United States ex rel. Milam v. Regents of Univ. of California*, 912 F. Supp. 868 (D. Md. 1995); *United States ex rel. Moore v. University of Mich.*, 860 F. Supp. 400 (E.D. Mich. 1994); *United States ex rel. Fine v. University of California*, 821 F. Supp. 1356 (N.D. Cal. 1993), *aff'd*, 72 F.3d 740 (9th Cir. 1995); *United States ex rel. Navarette v. Rockwell Int'l Corp.*, 730 F. Supp. 1031, 1035 (D. Colo. 1990).

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While the Court determined that Congress' intent to abrogate the states' immunity from suit was unmistakably clear, it also determined that the Indian Gaming Regulatory Act was not passed pursuant to a valid exercise of power. *Seminole Tribe*, 116 S.Ct. at 1124. Following *Seminole Tribe's* thinking, State Defendants in the case at hand also state that Congress was simply without power to delegate authority to the qui tam plaintiff. In addition, they assert that the Act also does not clearly abrogate the states' immunity.

This Court, however, finds that the Supreme Court's ruling in *Seminole Tribe* was not a pseudo overruling of previous Circuits' rulings as to sovereign immunity and the qui tam action. That case stated that Congress must use unequivocal statutory language if it intends to abrogate a state's sovereign immunity in suits brought by and for private parties. However, this is a non-issue in a case brought by a private party but for the federal government. The *Seminole Tribe* case left in tact the fact that the federal government may sue states in federal court. *Seminole Tribe*, 116 S.Ct. at 1131 n. 14.[25] As explained above, the government is the real party in interest, regardless of whether is has elected, as in this case, not to intervene at this time. The government has

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25. In *Chavez v. Arte Publico Press*, the Supreme Court remanded the case for reconsideration in light of its *Seminole Tribe* ruling. On remand, the Fifth Circuit found that *Seminole Tribe* inescapably suggests and declares that "Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent' to being sued in federal court." 1998 WL 184437, *3 (5th Cir. 1998). That case dealt with provisions of the Copyright and Lanham Acts and a theory of implied waiver, and a suit by a private citizen brought on her own, and not on the government's behalf.

chosen not to intervene at this time in this particular lawsuit. The government may never intervene in Relator Churchill's suit; however, the fact that the government *can* intervene at any time is an important point to remember. Therefore, this Court finds that sovereign immunity is unavailable and the Supreme Court's analysis in *Seminole Tribe* is inapplicable. State Defendants' Motion to Dismiss based on sovereign immunity shall be denied.

E. THE MEANING OF "PERSONS" WITHIN THE FALSE CLAIMS ACT

State Defendants argue in the alternative that the State and its agencies are not "persons" within the meaning of the Act, and therefore, they cannot be held liable for any alleged fraudulent conduct.

The Act provides in part that "any person" who causes false claims and reports to be presented to the United States for payment, or who forms a conspiracy to have false claims paid by the United States, will be liable for treble damages and civil penalties. *See* 31 U.S.C. § 3729. The Act, in this particular section, does not define the word person. *See id.* at § 3729. Section 3733, however, defines "person" to include the state. *Id.* at § 3733(1)(4).[26]

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26. State Defendants assert that this Section 3733's inclusion of the state as "persons" applies only to instances involving civil investigative demands as they pertain to the Attorney General's authority to issue them upon persons who have possession and control over documents relevant to the investigation. Generally, this section requires the states to provide such information to the federal government upon request.

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As State Defendants would infer, therefore, under the "clear statement rule," a state and its agencies cannot be sued under the Act. However, the Court will not deny State Defendants sovereign immunity on the one hand and then find them not to be "persons" within the meaning of the Act on the other hand. As one Court stated, the "fundamental task in interpreting the FCA is 'to give effect to the intent of Congress.' " *Long*, 1998 WL 151290, *4. The common usage of the term "person" usually does not include the sovereign. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (finding that "person" in 42 U.S.C. § 1983 does not include the state).[27] However, although the term "person" ordinarily does not include the sovereign, this ordinary usage "may . . . be disregarded if '[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring a state or nation within the scope of the law.' " *See International Primate Protection League v. Administrators of Tulane Educ. Fund.*, 500 U.S. 72, 83 (1991). The purpose of the Act is to act as a weapon against *all* fraud *on the United States government*. Therefore, the

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27. This case involved a 42 U.S.C. § 1983 action which establishes a cause of action for individual plaintiffs. The False Claims Act, on the other hand, establishes civil penalties for fraud at the expense of the United States.

See also Hilton v. South Carolina Public Railways Commission, 502 U.S. 197, 205 (1991) (finding that the Supreme Court ruling in the *Will* case did not create a per se rule of constitutional law that precluded the application of general liability statutes to the states, absent a clear statement by Congress that it intends to subject the states to the provisions of the law).

Act was intended to benefit the *United States government.* The Act is not simply a suit by a private citizen for a private citizen; it is a suit by a private citizen, *for* the United States government, *on behalf of* the United States government. Congress did not need to clearly state its intention to abrogate state immunity since any suit brought pursuant to this Act is brought on behalf of the federal government, and states have no immunity in suits by the federal government.[28] The Court does not believe that Congress would be naive enough to think that state governments and their agencies would not perpetrate fraud upon the federal government. The federal government has contracts with all types of "persons" including corporations, private businesses, and states, and state agencies. Consequently, if a state and its agencies are indeed the central violator of fraud upon the government, Congress would simply not intend to allow that particular state the use of the immunity defense.

Furthermore, courts have permitted states to serve as relators and to bring qui tam actions on behalf of the government. *See* 31 U.S.C. § 3730(b); *United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986) (Colorado as relator); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (Wisconsin as relator). Thus, it seems only logical that if states are permitted to serve as relators, then they are considered "persons" within the Act. The sword is a double-edged one.

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28. Compare to *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, No. 3-95-168 (D. Minn., filed July 23, 1997) (finding that based on history, Congress most likely did not intend for "persons" to include states).

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State Defendants also note that they should not be considered "persons" under the Act, which imposes treble damages on violators, because courts have been reluctant to impose states to punitive damages.

The Act's purposes is to recover losses the government has sustained as a result of fraud. *See* S. Rep. No. 345. The Supreme Court found in several cases that the Act was a remedial and not a punitive statute. All of these cases, however, did refer to the pre-1986 Act which provided for double and not treble damages. *United States v. Bornstein*, 423 U.S. 303, 314-25 (1976) (finding damage provision as remedial except under extreme circumstances); *Marcus*, 317 U.S. at 551-52 (finding that the Act's purpose was to make the government whole and therefore the damage provisions were not punitive). Other courts have referred to the Act's damages provisions as "rough remedial justice." *See e.g., United States v. Brekke*, 97 F.3d 1043, 1047 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1281 (1997). *See also Sanders*, 953 F. Supp. 1404 (finding that absent proof of actual damages to the United States, relators will not be allowed treble damages). This Court concludes that provided there is a rational relation between the government's losses and the damages assessed, then the Act's damage provisions are not punitive in nature.

The Court tries to avoid contradicting itself too much. Therefore, until it is very established that state defendants, such as those in this lawsuit, can claim sovereign immunity under the Act, the Court refuses to find that State Defendants are not persons under the Act. This Court concludes that for purposes of Section 3729 of the Act, the term "persons"

includes states and all their agencies. State Defendants' Motion to Dismiss based on this argument shall be denied.

IV. CONCLUSION

As this Court has demonstrated in the past, it is certainly not afraid the declare an Act of Congress as wholly unconstitutional.[29] However, after an extensive review of Defendants' Motions to Dismiss and the law surrounding the False Claims Act, this Court concludes that the Act's qui tam provisions do not conflict with Article III of the Constitution, nor do they violation the separation of powers principle. Furthermore, the Court finds that State Defendant are "persons" within the meaning of the Act, and they also do not enjoy immunity from suit. Finally, the Relator's Complaint is pled with sufficient specificity to put Defendants on notice so that they can prepare their defense, as the Court is certain that they have already done so.

Accordingly,

IT IS ORDERED that Defendant National Heritage Insurance Company's Motion to Dismiss Plaintiff's First Amended Original Complaint is hereby **DENIED**.

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29. *See Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995) (finding the Religious Freedom Restoration Act as a violation of the U.S. Constitution by changing the burden of proof as established under the *Employment Division v. Smith*, 110 S.Ct. 1593, free exercise cases). The Supreme Court, after reversing the Circuit Court, agreed that the Religious Freedom Restoration Act was unconstitutional. *See City of Boerne v. Flores*, 117 S.Ct. 2157 (1998).

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IT IS FURTHER ORDERED that State Defendants' Motion to Dismiss is hereby **DENIED**.

SIGNED this 2nd day of June, 1998.

HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTES

31 U.S.C. § 3729

§ 3729. False claims

(a) **Liability for certain acts.** — Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without

completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that --

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the

> violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined**. — For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **Claim defined**. — For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will

reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure**. — Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion**. — This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

* * *

31 U.S.C. § 3730

§ 3730. Civil actions for false claims

(a) **Responsibilities of the attorney general**. — The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons**. — (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

> (A) proceed with the action, in which case the action shall be conducted by the Government; or
>
> (B) notify the court that it declines to take over the action, in which case the person bringing

---

1. *See*, now, Rule 4(i) of the Federal Rules of Civil Procedure.

the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to Qui Tam actions.** — (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or

would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to Qui Tam plaintiff.** — (1) If the Government proceeds with an action brought by a person

under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court

finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) **Certain actions barred**. — (1) No court shall have jurisdiction over an action brought by a former or present

member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent

knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses.** — The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **Fees and expenses to prevailing defendant.** — In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

* * *

Appendix C

31 U.S.C. § 3731

§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought —

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United

States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

* * *

31 U.S.C. § 3732

§ 3732. False claims jurisdiction

(a) **Actions under section 3730.** — Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) **Claims under state law.** — The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

* * *

Appendix C

31 U.S.C. § 3733

§ 3733. Civil investigative demands

(a) **In general**. —

(1) **Issuance and service**. — Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person —

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy

Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

* * *

(l) **Definitions**. — For purposes of this section —

(1) the term "false claims law" means —

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by

the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes —

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or

other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

* * * *

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No. 99-779

In the Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
JAMES M. CHURCHILL,
Petitioner,

v.

THE STATE OF TEXAS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

At issue in this case is whether the Eleventh Amendment's general prohibition against actions "commenced or prosecuted" by citizens against an unconsenting state bars an action brought by a private *qui tam* plaintiff against a state under the federal False Claims Act. U.S. CONST. amend. XI; 31 U.S.C. §§3729–3732.

The False Claims Act permits private citizens who believe a "person" has submitted a false claim for payment to the United States to sue the perpetrator to impose a penalty for the false claim, including treble damages. §§3729–3730. As an

incentive, the private plaintiff receives a portion of the award. §3730(d). While the statute deters fraud by private contractors, the Eleventh Amendment prohibits applying the False Claims Act to unconsenting states. The False Claims Act contains no language waiving the Eleventh Amendment immunity of states and, in any event, Congress has no power to abrogate the states' Eleventh Amendment immunity under its Article I constitutional powers. *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

SUMMARY OF THE ARGUMENT

The Eleventh Amendment prohibits suits "commenced or prosecuted" against the states by private citizens. U.S. CONST. amend XI. Suits against states brought by private relators under the *qui tam* provisions of the False Claims Act violate the states' immunity as sovereigns and offend their dignitary interest in avoiding the coercive process of federal judicial tribunals in suits brought by private citizens. Congress cannot circumvent the Eleventh Amendment's proscriptions by allowing private plaintiffs to "stand in the shoes" of the federal government. *Qui tam* suits are "commenced" and "prosecuted" by private citizens, and the potential intervention of the United States cannot change that fact.

Because the Court has already granted the petition for writ of certiorari in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, to resolve the issue presented by petitioner, the Court should hold this petition pending resolution of *Stevens* and then dispose of the petition as appropriate.[1]

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1. Respondents have also filed a conditional cross-petition that raises the "persons" issue also presented in the *Stevens* case.

ARGUMENT

I. ALLOWING PRIVATE CITIZENS TO BRING *QUI TAM* SUITS AGAINST THE STATES VIOLATES THE ELEVENTH AMENDMENT.

Subjecting the states to suits for money damages brought by private citizens under the *qui tam* provisions of the False Claims Act violates the Eleventh Amendment and the principles that motivated its passage. *See* 31 U.S.C. §§3729–3732; U.S. CONST. amend. XI. The Eleventh Amendment was enacted in a firestorm of protest shortly after the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III authorized a South Carolina citizen to bring a private suit for damages against the State of Georgia. One of the Amendment's primary aims was to address the states' concern that "federal courts would force them to pay their revolutionary war debts, leading to their financial ruin." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

In addition to the concern with protecting the states' fisc, Eleventh Amendment jurisprudence also emphasizes the need to protect the integrity of the states as sovereign entities. *Hess*, 513 U.S. at 39. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). The purpose of the Eleventh Amendment was to prevent the indignity of subjecting states to suits by private parties in federal court. *Id.* (citing *In re Ayers*, 123 U.S. 443, 505 (1887)).

By seeking money damages from the states at the urging of private plaintiffs, *qui tam* suits accomplish exactly what the Eleventh Amendment forbids. The Court has recognized "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *Qui tam* suits brought by private citizens against the states are indistinguishable from other suits that impermissibly seek the payment of damages from a state's treasury. That the relator brings suit "on behalf of" the United States is irrelevant for Eleventh Amendment purposes. *See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883-84 (CADC 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999) (No. 99-213). The *qui tam* relator's supposed representation of the United States' interests is a legal fiction that cannot justify granting a private plaintiff the United States' exemption from the Eleventh Amendment's protections. *See In re Fernandez*, 130 F.3d 1138, 1138 (CA5 1997) (holding that private successors to the FDIC may not "avoid the Eleventh Amendment by slipping into the shoes of the United States"); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987) (sovereign immunity is not at issue in suit by federal government against state); *United States v. Texas*, 143 U.S. 621, 646 (1892) (same). It is "as plain as the sun" that Petitioner was "commenc[ing] or prosecut[ing]" *qui tam* suits "against one of the United States" in violation of the clear dictates of the Eleventh Amendment. *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 (CA5 1999); *see also* U.S. CONST. amend. XI. The Eleventh Amendment's protections of state sovereignty cannot be circumvented so easily. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

When an action "is in essence one for the recovery of money from the state, the state is the real, substantial party in

interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Even if the United States ultimately intervenes in the suit, that does not change the Eleventh Amendment analysis.[2] A private citizen is still commencing suit against the state for money damages. The Eleventh Amendment cannot countenance a private citizen's claim on state funds, regardless of whether the United States has joined the suit as a party.

II. CONGRESS HAS NOT CLEARLY ABROGATED STATE SOVEREIGN IMMUNITY IN THE FALSE CLAIMS ACT.

Congress did not attempt in the False Claims Act to clearly abrogate state sovereign immunity. *See Seminole*, 517 U.S. at 55-56; *Foulds*, 171 F.3d at 294. But even if Congress had clearly attempted to abrogate state sovereign immunity in the False Claims Act, it could not have validly done so. The Court has only allowed abrogation of state sovereign immunity under the Fourteenth Amendment. *Seminole*, 517 U.S. at 59, 63 (overruling the Court's short-lived holding to the contrary in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality)). Congress enacted the False Claims Act under Article I of the Constitution, which the Court in *Seminole* held cannot be used to circumvent the Eleventh Amendment's limits on federal jurisdiction. *Id.* at 72-73; *see also United States ex rel. Stevens v. Vermont Agency of Nat. Resources*, 162 F.3d 195, 224 (CA2 1998) (Weinstein, J., dissenting), *petition granted*, (U.S. June 24, 1999) (No. 98-1828).

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2. Contrary to petitioner's assertion, *see* Pet. at 9, the United States has intervened in this suit only to defend the constitutionality of the False Claims Act as applied to the states.

The pertinent analysis when state sovereignty is involved does not end with determining whether Congress has attempted to find a way to bypass the Eleventh Amendment, *i.e.*, by allowing a private party to vindicate "real party" rights of the federal government. Rather, the real question, as explained by the Court in *Seminole*, is whether Congress has the constitutional authority to do what it has done. *See Seminole*, 517 U.S. at 59; *see also City of Boerne v. Flores*, 117 S.Ct. 2157, 2159 (1997) (holding that the Religious Freedom Restoration Act was not a proper exercise of Congress's Fourteenth Amendment enforcement powers). As the Fifth Circuit held and as the D.C. Circuit in *Long* observed, "[*q*]*ui tam* plaintiffs cannot qualify as surrogates of 'responsible federal officers' who have the right to represent the sovereign to sue the respective states." *Foulds*, 171 F.3d at 293; *see Long*, 173 F.3d at 883.

Just as Article I provided no basis for the expansion of Article III in *Seminole*, the federal government's right to sue states cannot be expanded in opposition to the Eleventh Amendment by the device of *qui tam* suits. It is offensive to the Eleventh Amendment to use the states' surrender of sovereignty to the federal government to allow private parties to bring states into court and prosecute actions against them.[3]

Nor can the *qui tam* relator hide behind the jurisdictional skirts of the federal government. Private citizens cannot assume the federal government's right to sue states, which "is a narrow and nontransferable exception to the broad and

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3. One commentator has suggested that *qui tam* actions are the hidden source of power to allow Congress to render the Supreme Court law on abrogation meaningless and should be used routinely to vindicate federal rights. *See* Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment." *Stevens*, 162 F.3d at 214 (Weinstein, J., dissenting) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing the federal government's right to sue because states gave their consent in joining the union). This Court should require the United States to sue the states itself if, in the exercise of its supremacy, it determines that such a suit is required to preserve the "permanence of the Union." *Texas*, 143 U.S. at 644-45. The nature of dual sovereignty requires as much. "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

If the *qui tam* device in the False Claims Act poses no constitutional problem, then Congress could set up any number of statutory devices to circumvent state sovereignty as long as there is a federal interest. Without Congress so stating, every Title IX, Title VI, and Section 504 case against a state would become a potential *qui tam* case, in which the plaintiff will demand, not actual damages, but a share of three times the federal funds received by the state for the past six years. Every public benefits class action involving federal funds could be a potential *qui tam* case.

The False Claims Act is unconstitutional—if applied to the states—because, through the *qui tam* device, it attempts to accomplish precisely what is forbidden by the Eleventh Amendment.

CONCLUSION

For these reasons, the Court should hold the petition for writ of certiorari pending resolution of the *Stevens* matter.

Respectfully submitted,

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